

Immigration Consequences of Criminal Convictions

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*Opinions expressed are those of the presenter and not necessarily those of the
Office of the Montana State Public Defender*

Our 6th Amendment Duty to Non-Citizens

- “In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense”
- Cf *Strickland v. Washington* (104 S.Ct. 2052 (1984)).
- Now comes *Padilla v. KY* (130 S.Ct. 1473 (2010))
 - 6th Amendment applies to immigration consequences of a criminal disposition
 - Deportation a “particularly severe ‘penalty’” closely linked to criminal process
 - Affirmative duty to advise of specific immigration consequences where “clear”
 - Where law not “succinct and straightforward,” must at least advise of risk of removal

Three-Step Process from Crim to Imm

- ◇ I: inadmissible or deportable?
- ◇ A: applicable grounds for removal?
- ◇ C: categorical match?

Source: Kara Hartzler, *Surviving Padilla: A Defender's Guide to Advising Noncitizens on the Immigration Consequences of Criminal Convictions* (Florence, AZ: Florence Immigrant and Refugee Rights Project, 2011)

Sample Intake Form

Non-Citizen Defendant Worksheet

Attorney: _____ Date: _____ A#: _____
 Defendant's Name: _____ Other Names Used: _____
 DOB: _____ POB: _____ Citizenship(s): _____
 Current Criminal Charge(s): _____
 Plea Offer(s): _____

Immigration Status and History:

Date of last entry: _____
☐ LPR – Lawful Permanent Resident (green card)
 Since when: _____
☐ Temporary Visa (in status)
 Prior Entry: _____
☐ Visa Overstay
☐ Refugee or asylee
 Since when: _____
☐ Undocumented (entered illegally "EWI")
☐ Previously deported or is in proceedings
 Call (800) 898-7180 to find out
☐ Temporary Protected Status (TPS)
☐ Other

Family Ties:

Spouse: ☐ USC ☐ LPR ☐ Undocumented
 Partner: ☐ USC ☐ LPR ☐ Undocumented
 Children: Number _____ Ages: _____
 _____ USC _____ LPR _____ Undocumented
 Mother: ☐ USC ☐ LPR ☐ Undocumented
 Father: ☐ USC ☐ LPR ☐ Undocumented
 USC Grandparents? ☐ Yes ☐ No

Re: Immigration Consequences

☐ Avoid conviction that triggers removability
☐ Preserve eligibility for future immigration benefits
 (e.g. LPR status or citizenship)
☐ Preserve ability to ask immigration judge to get/keep
 Lawful status & stay in U.S. (relief from removal)
☐ Get out of jail ASAP
☐ Immigration consequences, including removal, are not
 A priority

Other goals re: immigration consequences:

ICE Detainer: ☐ YES ☐ NO

Defendant is: ☐ IN CUSTODY
☐ NOT IN CUSTODY

Complete Criminal History:

Include offense, date of conviction and sentence (including suspended time) for each conviction. Include arrests, deferred adjudications, deferred sentences, juvenile history, or other resolutions.

Step 1: Inadmissible or Deportable?

REMOVABLE



Inadmissible

- May or may not be physically in U.S. now
- Ineligible to be admitted in the future
- Includes undocumented (e.g., crossed river), LPR at border, “parolee,” “work permit”
- Crim grounds at 8 USC 1182(a)(2) [INA 212(a)(2)]

Deportable

- Physically in U.S. now
- Now removable
- Includes entered on visa or waiver, even if expired
- LPRs inside U.S.
- Crim grounds at 8 USC 1227 (a)(2) [INA 237(a)(2)]

Step 2: Applicable Grounds of Removal? Criminal Grounds of Inadmissibility

No conviction required; admission may suffice

- **Moral turpitude (INA 212(a)(2)(A)(i)(I))**
 - CIMT: intent to steal or defraud; bodily harm by intentional act; serious bodily harm by reckless act; most sex offenses
 - Petty offense exception: single CIMT if maximum possible penalty is ≤ 1 year and actual penalty is ≤ 6 months (212(a)(2)(A)(ii))
- **Substance in Controlled Substances Act (212(a)(2)(A)(i)(II))**
 - NO marijuana exception
- **Multiple convictions w/ aggregate sentence of 5 years (212(a)(2)(B))**
- **Reason to believe “drug trafficker” (212(a)(2)(c)(i))**
- **Prostitution and commercialized vice (212(a)(2)(D))**

Inadmissibility Example

U.S. Department of Justice
Immigration and Naturalization Service

Continuation Page for Form NTA

Alien's Name

Jean

File Number

Date

AKA

A

MAR 15 2002
Haiti

ALLEGATIONS:

1). You are not a Citizen or National of the United States;

2). You are a Native of Haiti and a Citizen of Haiti;

3). You were paroled into the United States at New Orleans, Louisiana on or about June 17, 1992,;

4). You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act;

5). You were convicted of the crime of Attempted Robbery in the First Degree, in violation of Section 110/160.15(3) of the New York State Penal Law, pursuant to a Judgment entered on or about January 05, 1996, by the Supreme Court of the State of New York, County of Queens, under Indictment Number 1517-95;

6). You were convicted of the crime of Attempted Robbery in the Second Degree, in violation of Section 110/160.10(1) of the New York State Penal Law, pursuant to a Judgment entered on or about January 05, 1996, by the Supreme Court of the State of New York, County of Queens, under Indictment Number 1517-95;

CHARGES:

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, in that you are an alien who has been convicted of, or who admit having committed, or who admit committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

Section 212(a)(7)(A)(iii) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Signature

Title

Institutional Hearing Program Director

PAGE #

Step 2, Continued

Criminal Grounds of Deportability

INA 237 (a), 8 USC 1227 (a)(2)

No conviction required; admission may suffice

- **Moral turpitude conviction**
 - CIMT: intent to steal or defraud; serious bodily harm by reckless act; most sex offenses
 - 1 committed within 5 years of admission + potential sentence of one year or more (INA 237(a)(2)(A)(i))
 - 2 CIMTs after admission “not arising out of a single scheme”
INA 237(a)(2)(A)(ii)
- **Firearm or destructive device conviction** INA 237 (a)(2)(C)
- **Domestic violence** INA 237(a)(2)(E)
 - Domestic violence; stalking; child abuse, neglect or abandonment; violation of protection order (criminal or civil)
- **Aggravated felony conviction (AF)** INA 237(a)(2)(A)(iii) → 101(a)(43)

Deportability Example

U.S. Department of Homeland Security

FAST

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID :

FIN #:

File No: A

DOB:

Event No:

In the Matter of

AKA:

Respondent:

currently residing at:

HOUSTON SERVICE PROCESSING CENTER 15850 EXPORT PLAZA DR , HOUSTON TEXAS 77032

(281) 449-1481

(Number, street, city and ZIP code)

(Area code and phone number)

- ☐ 1. You are an arriving alien.
- ☐ 2. You are an alien present in the United States who has not been admitted or paroled.
- ☒ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of MEXICO and a citizen of MEXICO;
3. You were admitted to the United States at EL PASO, TEXAS on or about 1982 as a LAWFUL PERMANENT RESIDENT;
4. On 06/26/2001, you were enjoined under a protection order issued by the Liberty County Court [at] Liberty, Texas.
5. On 08/02/2001, that Court determined that you had engaged in conduct that violated a portion of that order that involved protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(E)(ii) of the Immigration and Nationality Act, as amended, in that you are an alien who at any time after entry has been enjoined under a protection order and has been determined to have engaged in conduct in violation of that order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.

- ☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
- ☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
5520 Greens Road Houston TEXAS 77032 TO BE SET

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set at a time to be set to show why you should not be removed from the United States based on the charge(s) set forth above.

charge(s) set forth above.

OSCAR T. CORTEZ

SDDO

(Signature and Title of Issuing Officer)

Date: October 26, 2008

HOUSTON, TEXAS

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07)

Step 3: Categorical Match?

Evaluating Impact of Conviction & Sentencing

- What is a “conviction” for imm purposes?
 - 8 USC 1101(a)(48)(A) [INA 101(a)(48)(A)]
 - A formal judgment of guilt entered by a court
 - Where adjudication withheld, defendant admits facts sufficient to warrant a finding of guilt **and** Court orders some form of punishment, penalty or restraint on liberty
- DHS burden to prove
- Government can use to show existence of conviction
 - 240(c)(3)(B)
 - Official judgment, plea, verdict, sentence, penal record
- Documents should be complete, accurate, reliable
- Evidence of conviction’s existence are not necessarily proof of elements of offense

Step 3, Continued

Evaluating Impact of Conviction & Sentencing

- Calculating sentences in imm context
 - 8 USC 1101(a)(48)(B) [INA 101(a)(48)(B)]
 - Sentence handed down by judge usually controls—not actual time served
 - Suspended execution of sentence: entire sentence counts
 - Recidivist enhancement (PFO) counts as part of sentence
 - Deferred imposition: entire sentence counts
 - Probation usually doesn't count as part of sentence
 - Concurrent sentences: don't add

Step 3 (Continued)

Categorical Analysis: Exact Match

- If there's a conviction, how do we know its immigration effect?
 - That is, if there's a conviction, which applicable grounds will actually trigger removability?
- Start with purely legal analysis
 - Identify generic definition
 - Does the Montana definition of the offense exactly match the federal ("generic") definition?
 - Compare the elements, statute, interpretative caselaw
 - Defendant's conduct doesn't matter
 - If the **full** range of conduct punished by the Montana statute falls within the federal definition => categorical match
- See *Taylor v. U.S.* (495 U.S. 575(1990))
- In flux in the 9th Circuit

Step 3 (Continued)

Categorical Analysis: No Exact Match

➤ Modified categorical analysis

- Applies when elements of defendant's crime broader than generic definition
- In flux in the 9th Circuit
- Divisible statute – one offense can be committed in various ways
 - Statutory language and case law
- Modified categorical analysis
 - Permits courts to resort to expanded record of conviction
 - Complaint, plea agreement, colloquy, jury instructions, transcript of sentence, judgment
- Try to plead defendant to a factual basis that does not trigger a ground of removal
 - If can't, try to leave vagueness in factual basis for plea

➤ CIMTs or fraud ≥\$10K => case-specific analysis

- Beware: when in doubt, assume courts may have access to ROC *and* maybe other case-specific documents

Relief from Removal

- Crime may be a statutory bar
- Many avenues of relief are discretionary
- U.S. citizenship = jackpot!
- Common forms of relief:
 - Section 212(h) criminal waiver
 - Adjustment of status
 - Cancellation of removal
 - Asylum
 - Convention Against Torture
 - Special country-specific programs
 - Temporary Protected Status

Impact of Crime on Access to Relief

➤ Good moral character

N-400 Application for Naturalization

Part 10. Additional Questions (continued)

Write your USCIS A-Number here:
A

D. Good Moral Character.

For the purposes of this application, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.

15. Have you ever committed a crime or offense for which you were not arrested? ☐ Yes ☐ No
16. Have you ever been arrested, cited, or detained by any law enforcement officer (including USCIS or former INS and military officers) for any reason? ☐ Yes ☐ No
17. Have you ever been charged with committing any crime or offense? ☐ Yes ☐ No
18. Have you ever been convicted of a crime or offense? ☐ Yes ☐ No
19. Have you ever been placed in an alternative sentencing or a rehabilitative program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication)? ☐ Yes ☐ No
20. Have you ever received a suspended sentence, been placed on probation, or been paroled? ☐ Yes ☐ No
21. Have you ever been in jail or prison? ☐ Yes ☐ No

If you answered "Yes" to any of Questions 15 through 21, complete the following table. If you need more space, use a separate sheet of paper to give the same information.

Why were you arrested, cited, detained, or charged?	Date arrested, cited, detained, or charged? (mm/dd/yyyy)	Where were you arrested, cited, detained, or charged? (City, State, Country)	Outcome or disposition of the arrest, citation, detention, or charge (No charges filed, charges dismissed, jail, probation, etc.)

Answer Questions 22 through 33. If you answer "Yes" to any of these questions, attach (1) your written explanation why your answer was "Yes" and (2) any additional information or documentation that helps explain your answer.

22. Have you ever:

- a. Been a habitual drunkard? ☐ Yes ☐ No
- b. Been a prostitute, or procured anyone for prostitution? ☐ Yes ☐ No
- c. Sold or smuggled controlled substances, illegal drugs, or narcotics? ☐ Yes ☐ No
- d. Been married to more than one person at the same time? ☐ Yes ☐ No
- e. Helped anyone enter or try to enter the United States illegally? ☐ Yes ☐ No
- f. Gambled illegally or received income from illegal gambling? ☐ Yes ☐ No
- g. Failed to support your dependents or to pay alimony? ☐ Yes ☐ No

23. Have you ever given false or misleading information to any U.S. Government official while applying for any immigration benefit or to prevent deportation, exclusion, or removal? ☐ Yes ☐ No
24. Have you ever lied to any U.S. Government official to gain entry or admission into the United States? ☐ Yes ☐ No

Example of IJ Discretion in Granting Relief

U.S. Department of Justice Immigration and Naturalization Service		Continuation of Form I-862
Alien's Name [REDACTED]	File Number Case No: [REDACTED]	Date 09/23/05
<p>The Service alleges that you:</p> <ol style="list-style-type: none"> <input checked="" type="checkbox"/> You are not a citizen or national of the United States; <input checked="" type="checkbox"/> You are a native of [REDACTED] and a citizen of [REDACTED]; <input checked="" type="checkbox"/> You were admitted to the United States at New York on or about March 20, 1989 as a lawful permanent resident; <input checked="" type="checkbox"/> You were convicted of the crime of Criminal Possession of a Controlled Substance in the 7th degree, to wit: <u>Crack Cocaine</u>, in violation of Section 220.03 of the New York State Penal Law pursuant to a judgment entered on or about, <u>January 16, 1995</u> in the Criminal Court of the City of New York, County of New York under case # [REDACTED]; <input checked="" type="checkbox"/> You were convicted of the crime of Criminal Sale of Marijuana in the 4th degree, in violation of Section 221.40 of the New York State Penal Law pursuant to a judgment entered on or about, <u>August 9, 1995</u> in the Criminal Court of the City of New York, County of New York under case # [REDACTED]; <input checked="" type="checkbox"/> You were convicted of the crime of Criminal Sale of Marijuana in the 4th degree, in violation of Section 221.40 of the New York State Penal Law pursuant to a judgment entered on or about, <u>March 21, 1996</u> in the Criminal Court of the City of New York, County of New York under case # [REDACTED]; <p>On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:</p> <p>Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.</p>		
Signature [Signature]	Title AETMC SUP DETENTION & DEPORTATION OFFICER	

3 of 4 Pages

U.S. Department of Justice Immigration and Naturalization Service		Continuation of Form I-862
Alien's Name [REDACTED]	File Number Case No: [REDACTED]	Date 09/23/05
<p>Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.</p>		
Signature [Signature]	Title AETMC SUP DETENTION & DEPORTATION OFFICER	

4 of 4 Pages

Safe Criminal Dispositions

- Dismissal! Acquittal! (Avoid “conviction”)
- DPA – but beware of admissions
- Juvenile court
- For CIMT, petty offense exception
 - Inadmissibility: max possible penalty ≤ 1 year, actual penalty ≤ 6 months
 - Deportability: committed > 5 years after admission or potential sentence < 1 year
- A shorter jail sentence may be preferable to a longer suspended sentence
- Control record

Detention

- Mandatory grounds for detention at 8 USC 1226(c) [INA 236(c)]
 - Expansive
- Travel
 - Best to avoid travel across borders until case resolved

Take Away Points

- I! A! C!
- Gather complete history—criminal and immigration
- Remember that multiple grounds of removal may apply to your defendant
- Counter-intuitive strategies may make sense:
 - More jail time, less suspended time
 - But avoid sentencing triggers
 - Plead up
 - Strategy depends on client specifics and client wishes
- If can't avoid triggering removability, try **hard** to avoid aggravated felony

For Further Information

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Immigration & Naturalization Virtual Law Library
www.justice.gov/eoir/vll/libindex.html